Supreme Court, U.S.
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In the

Supreme Court of the United States

JEFFREY ZUCKER and DAVID HUDEPOHL,
Petitioners,

v.

ROBERT KENNEDY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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May 17, 2010

QUESTION PRESENTED

"It is apparent that Kennedy had a clearly established right to remain on public property based on the Supreme Court's holdings in *Fears*, *Papachristou*, *Kent*, and *Morales*." (Citations omitted.)

Robert Kennedy caused great concern among parents and lifeguards at a municipal pool because he appeared to be watching children. After parents and lifeguards reported their concerns and observations over a period of weeks, Kennedy's ten dollar pool token was revoked. It also led, according to Kennedy, to him being banned from all Cincinnati recreation properties indefinitely by Police Officer Jeffrey Zucker.

In denying Officer Zucker qualified immunity, the Sixth Circuit inferred a right to loiter in public places from the right to intrastate travel which they inferred from the right to interstate travel.

Had this incident happened twenty-five miles west of Cincinnati in Indiana, there would have been no constitutional violation because the Seventh Circuit would hold there was no constitutionally protected liberty interest.

This begs the question:

Is the right to loiter in a public recreation space a clearly established, constitutionally protected liberty interest?

PARTIES TO THE PROCEEDING

Petitioners (defendants and appellants below):

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CITATIONS FOR OPINIONS BELOW

The decision of the Sixth Circuit Court of Appeals is reported as *Kennedy v. Cincinnati*, 595 F.3d 327 (6th Cir. 2010). App. 1-20. The District Court's order denying the defendants' motion for summary judgment was not reported. App. 21-27. The District Court's order denying the defendants' motion to dismiss was not reported. App. 28-35.

BASIS FOR JURISDICTION IN THIS COURT

The Court of Appeals filed its decision on February 16, 2010. 28 U.S.C. 1254 confers jurisdiction on this Court to review on a writ of certiorari the opinion of the Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISION AT ISSUE

UNITED STATES CONSTITUTION AMENDMENT XIV (Section One):

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case arises from the decision to revoke a ten dollar pool token and to ban Robert Kennedy from accessing recreation facilities of the City of Cincinnati. For purposes of this appeal, the defendants accept the allegation that Officer Zucker banned Kennedy from all recreation properties indefinitely.

A perceived threat to children

Robert Kennedy purchased a ten dollar pool token so that he could access the local municipal pool. The pool manager, Ann Cousins, was told by the director of an adjacent municipal recreation facility that Kennedy had been kicked off the adjacent elementary school grounds for watching children. The recreation facility director warned Cousins to keep an eye on Kennedy. The supervisor of Cousins, David Hudepohl—a named defendant in this case, was also made aware of the elementary school incident and told Cousins to maintain a log of Kennedy's actions.

Over the course of a few weeks, Kennedy was observed watching children. He made the lifeguards uncomfortable. One lifeguard reported that Kennedy tried to play ball with a boy and followed him into the woods. Multiple parents at the pool approached Cousins to inform her that they felt uncomfortable with Kennedy's presence.

During a swim meet at the pool, Kennedy approached the pool fence and stood on the outside watching children. Mothers were concerned that Kennedy was staring at their children and they were worried he could be a pedophile. One parent noticed

Kennedy had a "fixed kind of a scary smile." This parent was also a teacher at the Hamilton County Justice Center. She approached Kennedy to speak with him. After introducing herself, she informed Kennedy that he was "creeping some people out." Kennedy mumbled something and left.

Revocation of a ten dollar pool token and ban from municipal recreation properties

After the swim meet, the same parent who approached Kennedy contacted the aquatics director for the City of Cincinnati and informed her of the incident and her concerns. The aquatics director contacted Hudepohl and told him to let her know the next time that Kennedy was at the pool.

The next day Kennedy showed up at the pool. He was dressed in street clothes and sat on a bench six feet from the pool with a newspaper. Hudepohl observed Kennedy and believed he was not reading the paper but watching children. Hudepohl called the aquatics director and she told him to call the police, which he did.

The police arrived and investigated. While Officer Zucker spoke with Kennedy his partner checked to see if Kennedy was a registered sex offender. He was not. At this point, Officer Zucker ceased his investigation because he no longer had reasonable suspicion. He asked Hudepohl how he wanted to proceed.

Hudepohl told the officers that Kennedy would be banned from the pool for the rest of the season and that he wanted Kennedy's pool token back. Officer Zucker approached Kennedy and told him that

Hudepohl, as an agent of the Cincinnati Recreation Commission, wanted Kennedy to surrender his pool token. Kennedy alleges that Officer Zucker banned him from all municipal land and facilities operated by the Cincinnati Recreation Commission. Kennedy surrendered his pool token and left the area.

The litigation

After his pool token was revoked and he was banned from recreation properties, Kennedy filed this lawsuit. He alleged that the City of Cincinnati, Officer Zucker and Hudepohl deprived him of a property interest and a liberty interest without procedural due process. The defendants moved to dismiss but the motion was denied. After extensive discovery the defendants moved for summary judgment. The trial court dismissed the City of Cincinnati but did not grant qualified immunity to either Officer Zucker or Hudepohl. The trial court determined that Kennedy had a clearly established constitutionally protected property interest to access the municipal pool. The trial court did not speak to whether Kennedy had a clearly established constitutionally protected liberty interest.

Officer Zucker and Hudepohl filed an interlocutory appeal to the Sixth Circuit. The Sixth Circuit reversed the trial court's decision that Kennedy had a constitutionally protected property interest in a ten dollar pool token. The appellate court ruled that the interest was de minimis. The Sixth Circuit also reversed the decision that Hudepohl was not entitled to qualified immunity after plaintiff's counsel conceded at oral argument that he had insufficiently pled a procedural due process claim against Hudepohl.

The Sixth Circuit, however, determined that Kennedy had a clearly established constitutionally protected liberty interest to access municipal recreation properties and therefore denied qualified immunity to Officer Zucker.

This petition follows.

REASONS FOR GRANTING CERTIORARI

This Court has never specifically addressed the textual basis in the Constitution for the right to travel. Regardless, the right to travel is by this point well established as a right fundamental to our democracy. But because the textual basis for the right to travel is unclear, there is uncertainty among circuit courts as to the right of intrastate travel. This Court has not discussed the distinction between interstate travel and intrastate travel since 1974.

In this case, the Sixth Circuit inferred from the uncertain right of intrastate travel a liberty interest in the right to loiter on municipal recreation properties. In support of this extension, the Sixth Circuit relied upon *Williams v. Fears*, 179 U.S. 270 (1900), *Papachristou v. Jacksonville*, 405 U.S. 156 (1972), *Kent v. Dulles*, 357 U.S. 116 (1958), and *Chicago v. Morales*, 527 U.S. 41 (1999). The Sixth Circuit declared: "It is apparent that Kennedy had a clearly established right to remain on public property..."

Other than the plurality in *Morales*, none of the cited cases support the Sixth Circuit's holding. *Williams v. Fears* upheld a law taxing emigrant agents. Emigrant agents assisted African-Americans who sought greater economic freedoms and

opportunities to move out of state. Georgia enacted a law to tax this profession and, intentionally or not, made the migration of African-Americans out of Georgia more difficult. It is ironic that the Sixth Circuit chose this case to support a right to freedom of movement.

More than that, the Court in *Williams* did not use economic substantive due process to strike the law down. The Court determined that the effects of the law on the "right of locomotion" and the right to contract were remote. *Williams*, 179 U.S. at 274-75. (The Court determined the effects on interstate travel were remote despite strong evidence to the contrary. See David E. Bernstein, *The Law and Economics of Post-civil War Restrictions on Interstate Migration by African-Americans*, 76 Texas L. Rev. 781-847 (Mar. 1998)). Finally, the precedential value of *Williams* has been questioned in light of its association with *Lochner*-era judicial activism. See *Lutz v. York*, 899 F.2d 255, 266 (3rd Cir. 1990).

In *Papachristou*, this Court held that a vagrancy ordinance passed by Jacksonville was unconstitutionally vague. The ordinance in question outlawed a number of activities, including juggling, nightwalking, and habitual loafing. The *Papachristou* Court focused on the failure of the ordinance to provide fair notice of what constituted criminal conduct. More than being concerned about the effect on the liberty interest in freedom of movement, the Court was concerned with the potential for discriminatory enforcement. *Papachristou*, 405 U.S. at 162-63.

Unlike the defendants in *Papachristou*, Kennedy was not arrested. His freedom of movement was not

curtailed. Kennedy could access and remain in the extensive and popular Cincinnati park system during regular operating hours. He could go to municipal recreation centers outside the City of Cincinnati. *Papachristou* says nothing about the supposed liberty interest in remaining on public recreation property.

Kent v. Dulles implicated First Amendment concerns more so than an impingement on the freedom of movement. See *Regan v. Wald*, 468 U.S. 222, 241 (1984). Beyond that, *Kent* did not speak to a right to remain in a public place; it dealt with the issuance of passports to alleged communists.

The plurality in *Chicago v. Morales* did identify "the freedom to loiter for innocent purposes" as part of the liberty protected by the Due Process Clause of the Fourteenth Amendment. However, this statement was made by a plurality of just three justices. Furthermore, the street gang ordinance in question applied to streets and public rights of way. Here, Kennedy was banned from municipal recreation facilities. He was not going to the pool to acquire information; nor was he going to the pool to protest or engage in political discourse. Ostensibly he was at the pool to go for a swim. His behavior, however, suggested to numerous observers a different motive altogether.

Finally, Justice Scalia and Justice Thomas deconstructed the plurality's opinion and found no support for a right to loiter. Thus, the only support for the Sixth Circuit's holding is the three justice plurality decision in *Morales*.

Meanwhile, twenty-five miles away from Cincinnati, the Seventh Circuit would reach a different

result. In *Brown v. Michigan City*, a man was observed watching children at a municipal park. His activities were monitored and eventually he was approached by police and a city attorney. His park pass was confiscated and the officers informed Brown he was no longer allowed in the park. He was warned that if he was present in the park again he would be arrested for trespassing. The City later passed a resolution banning Brown from Michigan City parks indefinitely. Brown filed a lawsuit challenging the ban on the grounds that it deprived him of a constitutionally protected property interest and liberty interest in being permitted to enter Michigan City parks. The district court dismissed the claims on summary judgment and Brown appealed. On appeal, the Seventh Circuit held: "Because we conclude that Mr. Brown was not deprived of a valid liberty or property interest, however, we have no occasion to address definitively what process was due and whether the process afforded was adequate under the circumstances." *Brown v. Michigan City*, 462 F.3d 720, 732 (7th Cir. 2006).

Similarly, in *Williams v. Town of Greenburgh*, a man was expelled and banned from a community recreation center. Williams alleged that the expulsion and ban infringed on his liberty interest by depriving him of the right to free movement without affording him procedural due process. The Second Circuit disagreed:

> Because we hold that a municipality's decision to limit access to its facilities does not interfere with the right to free movement, we conclude that Williams' expulsion and temporary exclusion from the Center did not deprive him of

> a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. *Williams v. Town of Greenburgh*, 535 F.3d 71, 76 (2nd Cir. 2008).

The Second Circuit reasoned that if it were to hold otherwise, "it would distort the right to free travel beyond recognition to construe it as providing a substantive right to cross a *particular* parcel of land, enter a *chosen* dwelling, or gain admittance to a *specific* government building."

Much like Williams, Kennedy wishes to cross a *particular* parcel of land and gain admittance to a *specific* government building. But again, his interest in "recreation" is not a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. As Justice Scalia stated in *Planned Parenthood v. Casey*:

> That is, quite simply, the issue in these cases: not whether the power of a woman to abort her child is a "liberty" in the absolute sense; or even whether it is a liberty of great importance to many women. Of course it is both. The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion not because of anything so exalted as my views concerning the 'concept of existence, of meaning, of the universe, and of the mystery of human life.' Rather, I reach it for the same reason I reach the conclusion that bigamy is not constitutionally protected—because of two simple facts: (1) the Constitution says nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally

> proscribed. *Planned Parenthood v. Casey*, 505 U.S. 833, 980 (1992) (citations omitted).

Similarly, the right to loiter on recreational space may be important to many citizens, but the Constitution says nothing about it and loitering itself has a long tradition of being criminalized—as evidenced by Justice Thomas' dissent in *Morales*. *Morales*, 527 U.S. at 103-06.

Although the Fourth Circuit in *Willis v. Marshall, N.C.* did not analyze the procedural due process claim in depth, the facts of that case are also analogous and the court's decision is useful. Willis liked to dance provocatively at the community recreation center. She was asked not to do so, but she continued. She was ultimately banned from the community center by the town's mayor. In its decision, the Fourth Circuit disposed of the case largely because it held that recreational dancing is not protected by the First Amendment. However, when discussing the procedural due process claim, the appellate court noted that whether the right to access a public forum was a constitutionally protected liberty interest was "far from clear." *Willis v. Marshall*, 426 F.3d 251, 266 (4th Cir. 2005).

The Sixth Circuit decision in *Kennedy* conflicts with other circuit courts. The body of law governing the right to intrastate travel and the concomitant right to loiter is far from clear. The Court should hold that a municipality's decision to limit access to its recreational properties does not infringe upon a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. There is no textual basis for the Sixth Circuit's decision. As this Court stated in

Bowers v. Hardwick, "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986).

CONCLUSION

Based on the foregoing, the petitioner submits that the reported decision of the Sixth Circuit Court of Appeals is in conflict with the decisions of other Circuit Courts and involves an important federal question that should be settled by this Court. Accordingly, petitioner requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 09-3089

[Filed February 16, 2010]
Corrected February 18, 2010

ROBERT KENNEDY, *Plaintiff-Appellee,*	)
v.	)
CITY OF CINCINNATI, et al., *Defendants,*	)
JEFFREY ZUCKER, Police Officer; DAVID HUDEPOHL, *Defendants-Appellants.*	)

Appeal from the United States District Court for the Southern District of Ohio at Cincinnati.
No. 07-00512—Timothy S. Black, Magistrate Judge.

Argued: December 3, 2009

Decided and Filed: February 16, 2010

Before: GRIFFIN and KETHLEDGE, Circuit Judges; CARR, Chief District Judge.*

COUNSEL

ARGUED: Peter J. Stackpole, CITY OF CINCINNATI, OFFICE OF CITY SOLICITOR, Cincinnati, Ohio, for Appellants. Steven F. Stuhlbarg, LAW OFFICE, Cincinnati, Ohio, for Appellee. **ON BRIEF:** Peter J. Stackpole, CITY OF CINCINNATI, OFFICE OF CITY SOLICITOR, Cincinnati, Ohio, for Appellants. Steven F. Stuhlbarg, LAW OFFICE, Cincinnati, Ohio, for Appellee.

OPINION

GRIFFIN, Circuit Judge. Defendants Jeffrey Zucker and David Hudepohl appeal the denial of their motion for summary judgment based on the defense of qualified immunity from plaintiff Robert Kennedy's procedural due process claims brought under 42 U.S.C. § 1983. For the reasons that follow, we reverse in part and affirm in part. In doing so, we hold that Kennedy did not have a protectable property interest in his $10 City pool token, but possessed a clearly established constitutionally-protected liberty interest not to be

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* The Honorable James G. Carr, Chief United States District Judge for the Northern District of Ohio, sitting by designation.

banned from all City recreational property without procedural due process.

I.

The City of Cincinnati, through the Cincinnati Recreation Commission ("CRC"), operates swimming pools and recreation facilities. "Recreation programs and facilities are open to all citizens regardless of race, gender, color, religion, nationality, sexual orientation or disability." (alteration in emphasis.) The City offers access to its swimming pools by issuing pool tokens, which cost $10. Pool tokens, however, are not issued automatically. The City retains "discretion to refuse to issue a token depending on circumstances[,]" and must refuse to issue a pool token for the following seven reasons:

> [1.] The City may not issue a token to a person suspected of having an infectious or communicable disease.
>
> [2.] The City may not issue a token to a person with head lice or ringworm.
>
> [3.] The City may not issue a token to a person with an obvious infectious wound.
>
> [4.] The City may not issue a token to a sex offender.
>
> [5.] The City may not issue a token to a known violent or dangerous person.

> [6.] The City may not issue a token to persons known to have violated pool rules in the past.
>
> [7.] The City may not issue a token to a person who is obviously high or intoxicated.

When a pool token is issued, the new member completes and signs a membership card, which states:

> I agree to follow the rules and policies and procedures of the Cincinnati Recreation Commission. I understand that my membership may be revoked without a refund if I do not follow the rules.

"[M]embership card[s] [are] kept at the pool where the new member purchased the token" and "contain[] the identifying number of the token that was purchased." The tokens are not transferable and may not be used by more than one person.

The CRC's rules, policies, and procedures in effect during the relevant time period are contained in the *CRC Aquatic Division Program Brochure 2007*. The rules provide that the CRC "has the responsibility to provide a clean, pleasant, and safe environment for public swimming." Because "[s]ituations may occur that require immediate corrective action[,]" the CRC grants lifeguards "full authority to act in order to ensure the safety of swimmers." The Brochure also contains a list of "General Facility Rules," including the following: "Only adults supervising children are permitted inside [the] pool area wearing street clothes,

and should remain back near the fence, not up by the pool."

During 2007, Jeff Brokamp was the principal of Mt. Washington Elementary School, which is located next to Mt. Washington pool. For two days in "April or May" of 2007, Kennedy allegedly was "staring" at children at the elementary school during a field day. The children and teachers felt "uncomfortable" with Kennedy "standing very close" to them. Therefore, the teachers sent two students into the school building to inform Brokamp of the situation and their discomfort. Brokamp followed the students into the field, watched Kennedy for a "few seconds[,]" and then approached and introduced himself. Brokamp spoke with Kennedy for a "few minutes" and asked him to move away from where the children were playing. Kennedy subsequently left the area.

Ann Couzins was the pool manager for Mt. Washington pool in 2007. According to Couzins, Mark Celsor, the director of the Mt. Washington Recreation Center, had asked her to "keep an eye on" Kennedy even before he joined the pool because of the incident that occurred at Mt. Washington Elementary School. This request was also made by pool supervisor and defendant David Hudepohl, who asked Couzins "to go ahead and keep an eye on him" and to maintain a log of Kennedy's actions. Couzins testified that for "four or five days in a row" she saw Kennedy "just standing outside the gate watching the pool and looking at the kids." She described his behavior as "a little bit strange."

In June 2007, Kennedy purchased a pool token from the CRC for $10. During June, Kennedy

frequently used the pool token to visit the CRC operated pool in the neighborhood of Mt. Washington. As instructed, Couzins kept a record of the pool staff's observations of Kennedy. Couzins did not personally see Kennedy interacting with any of the children at the pool but noted the observations of the other lifeguards. She testified that "all" of the lifeguards "observed [Kennedy] . . . at the pool watching the kids[,]" and that they "all felt uncomfortable around him[.]" Couzins specifically described how lifeguard Jenny Sallee saw Kennedy "trying to . . . throw a ball with [a boy] or follow him into the woods[.]"[1] "[M]ultiple parents at the pool" also approached Couzins to communicate "that they felt uncomfortable with [Kennedy's] presence" at the pool.

On June 20, 2007, Kennedy watched a swim meet at the pool. Tamara Kluckman-Gory, a teacher at the Hamilton County Justice Center, noticed Kennedy observing the meet with a "fixed smile, fixed kind of a scary smile." Kluckman-Gory testified that mothers were concerned that Kennedy was staring at the children, and she had heard that there was worry that "somebody at the pool . . . could be a pedophile[.]" She decided to "confront[]" Kennedy and walked over to speak with him. After exchanging pleasantries, Kluckman-Gory informed Kennedy that he was "kind of creeping some people out." Thereafter, Kennedy "mumbled something" and left the pool area.

On June 21, 2007, Kennedy arrived at the pool and sat on a bench approximately six feet from it. Kennedy was wearing a shirt, shorts, and sandals; he

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[1] The boy and his mother lived in Kennedy's apartment building.

wore a swimsuit beneath his shorts. Hudepohl observed Kennedy reading a newspaper, but suspected he was actually watching children in the pool.

Hudepohl called his supervisor, Jincey Yemaya, who instructed Hudepohl to contact the police. Hudepohl called the police and asked that Kennedy be investigated "because he was removed from the playground for lurking and staring at young kids during recess and . . . was seen by guards following children back into the woods."[2] Cincinnati Police Officers Christine Smith and Jeffrey Zucker arrived in the Mt. Washington School parking lot, where they were met by Hudepohl. Hudepohl informed the officers that: (1) Kennedy was wearing street clothes in violation of CRC rules and regulations;[3] (2) he had been "lurking along the fence line" and not swimming in the pool area; (3) parents had expressed concerns regarding Kennedy's behavior; (4) the principal from Mt. Washington Elementary School had banned Kennedy from "Olympic day"; and (5) Kennedy had

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[2] The police report indicates that the police received a statement that a 44-year-old, white male, 6'0, wearing a blue and white floral shirt and brown shorts had been seen "following the kids into the woods, daily, [for] a wk & has been kicked out [several] times, [for] lurking[.]"

[3] Kennedy argues that this fact "is irrelevant, for it is undisputed that Mr. Kennedy's clothing is not the reason why Mr. Kennedy's pool pass was confiscated, and is not the reason he was ordered off of CRC property permanently." Moreover, Hudepohl testified that, while he has consistently approached other individuals for violating this rule and has asked them not to return to the pool wearing street clothes, he has never reported them to the police or banned them from the pool.

been seen at a swim meet, standing at the fence watching children.

Thereafter, the officers approached Kennedy in the pool area, accompanied by Hudepohl. Zucker questioned Kennedy for approximately fifteen minutes, during which time Zucker informed him that the officers were there "as a precaution" because people were concerned Kennedy was "child watching." While Zucker spoke with Kennedy, Smith queried her computer to check whether Kennedy had any outstanding warrants or whether he was listed as a sexual predator in Hamilton County. From her search, Smith determined that Kennedy was not listed as a sexual predator and had no current warrants. Zucker asked a few more questions regarding why Kennedy was at the pool, and then terminated his investigation because his "basis for any reasonable suspicion to stop Mr. Kennedy had ceased, because [he] had no crime that [he] could verify had been committed, nor could [he] identify one that [was] being committed or [was] going to be committed." The officers subsequently asked Hudepohl how he wanted to proceed.

Hudepohl informed the officers that Kennedy would be banned from Mt. Washington pool for the rest of the season, and that he would like the officers to retrieve the pool token from Kennedy. Thereafter, Zucker approached Kennedy and told him that Hudepohl, acting as an agent of CRC, was requesting that Kennedy surrender his pool pass. In addition, Zucker informed Kennedy that Hudepohl was barring him from "CRC property in Mt. Washington, i.e., the ball fields and the pool area, as well as Mt. Washington

School.'"[4] In response, Kennedy surrendered his pool pass and apparently left Mt. Washington pool without incident.

On February 14, 2008, Kennedy filed an amended complaint in the Southern District of Ohio, alleging that defendants Zucker, Hudepohl, and the City of Cincinnati violated his constitutional rights by confiscating his property, and by restricting his liberty, without due process of law.[5] In addition, Kennedy pleaded a state law claim of defamation, contending that Hudepohl defamed him by falsely implying that he had engaged in serious sexual misconduct. On October 16, 2008, defendants moved for summary judgment, arguing that they were entitled to qualified immunity because Kennedy failed to show that his clearly established rights were violated. On January 12, 2009, the district court granted summary judgment for the City of Cincinnati but denied summary judgment for Zucker and Hudepohl, finding that "access to the public pools constitutes a cognizable property interest" and that genuine issues of material

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[4] Kennedy asserts that he was banned from "all municipal land and facilities operated by the Cincinnati Recreation Commission[,]" not just the CRC grounds located in Mt. Washington. He supports this claim with his affidavit, the testimony of Officer Smith that Zucker typed a computer entry stating that Kennedy was "banned from CRC property," and a copy of the incident report stating Kennedy was "banned from CRC properties[.]"

[5] Kennedy filed his first complaint on July 2, 2007, but did not name Hudepohl as a defendant at that time. In addition to adding Hudepohl as a defendant in his amended complaint, Kennedy also dismissed his claims against Smith, who was named as a defendant in the original complaint.

fact exist as to what process Kennedy was afforded regarding the revocation of his pool pass.[6]

Defendants Zucker and Hudepohl filed this interlocutory appeal on January 21, 2009.

II.

We must first consider whether we have jurisdiction to address defendants' interlocutory appeal. 28 U.S.C. § 1291 limits our jurisdiction to "final decisions of the district courts of the United States . . . ." *Id.* "A district court's denial of qualified immunity is an appealable final decision under 28 U.S.C. § 1291, but only 'to the extent that it turns on an issue of law.'" *Estate of Carter v. City of Detroit*, 408 F.3d 305, 309 (6th Cir. 2005) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)). A defendant raising a qualified immunity defense "may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995); *see also Berryman v. Rieger*, 150 F.3d 561, 563 (6th Cir. 1998) ("A defendant who is denied qualified immunity may file an interlocutory appeal with this Court only if that appeal involves the abstract or pure legal issue of whether the facts alleged by the plaintiff constitute a violation of clearly established law."). Nevertheless, that the district court here denied defendants' motion for summary judgment on the ground that genuine

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[6] The City of Cincinnati was dismissed as a defendant by the district court pursuant to *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978).

issues of material fact exist does not necessarily preclude our jurisdiction over defendants' appeal. Rather, we have recognized that, "*regardless of the district court's reasons* for denying qualified immunity, we may exercise jurisdiction over the . . . appeal to the extent it raises questions of law." *Williams v. Mehra*, 186 F.3d 685, 689-90 (6th Cir. 1999) (en banc) (internal quotation marks and citation omitted); *see also Turner v. Scott*, 119 F.3d 425, 428 (6th Cir. 1997).

As we recognized in *Livermore ex rel Rohm v. Lubelan*, 476 F.3d 397, 403 (6th Cir. 2007):

> Language in our earlier decisions interpreting *Johnson* suggests that where, as here, the appellant fails to concede the facts as alleged by the appellee, this court is completely deprived of jurisdiction over the appellant's interlocutory appeal. *See Berryman*, 150 F.3d at 563 ("If . . . the defendant disputes the plaintiff's version of the story, the defendant must nonetheless be willing to concede the most favorable view of the facts to the plaintiff for purposes of the appeal."). Subsequent cases, however, have rejected that approach and clarified that we may consider a pure question of law, despite the defendants' failure to concede the plaintiff's version of the facts for purposes of the interlocutory appeal: "If . . . aside from the impermissible arguments regarding disputes of fact, the defendant also raises the purely legal question of whether the facts alleged . . . support a claim of violation of clearly established law, then there is an issue over which this court has jurisdiction." *Estate of Carter*, 408 F.3d at 310 (internal quotations and

citation omitted); *see also Smith v. Cupp*, 430 F.3d 766, 772 (6th Cir. 2005); *but see McKenna v. City of Royal Oak, et al.*, 469 F.3d 559, 561 (6th Cir. 2006) (holding this court lacks jurisdiction to consider interlocutory appeal where appellant relies solely on disputed facts).

We therefore conclude that we have jurisdiction to consider whether, accepting as true the facts alleged by Kennedy, defendants are entitled to qualified immunity from Kennedy's claim of a due process violation. *See Mehra*, 186 F.3d at 689-90 (instructing that this court has jurisdiction to consider whether facts, as alleged by plaintiff, entitle defendant to summary judgment); *Berryman*, 150 F.3d at 562 (same).

III.

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. XIV § 1. For Kennedy to prevail on his procedural due process claim, he must show that he was deprived of a constitutionally-protected property or liberty interest and that the deprivation occurred without due process. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must, instead, have a legitimate claim of entitlement to it." *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). Because he paid $10 to purchase the pool token, Kennedy claims he has "an enforceable entitlement to the token," which amounts to a property interest deserving of due process protection. Although the

parties dispute whether revocation of Kennedy's pool pass was meant to ban him only from Mt. Washington grounds or from all CRC properties, as noted above, we must assume as true all facts alleged by plaintiff.

However, even assuming that Kennedy was banned from all CRC properties that were generally open to the public, Kennedy cites no Ohio authority establishing a right to enter CRC properties or a constitutionally-protected property interest in his pool pass. *See Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 611 (6th Cir. 2006) (explaining that the question of whether a constitutionally-protected property interest exists is often a question of state law). Kennedy's reliance upon three cases in which the United States Supreme Court or this court found a cognizable property interest is misplaced because those cases involved significant interests related to an individual's ability to engage in an occupation or to provide sustenance to his family. *See Barry v. Barchi*, 443 U.S. 55, 64 (1978) (a horse trainer has a cognizable property interest in a horse trainer's license sufficient to invoke the protection of the Due Process Clause); *Dixon v. Love*, 431 U.S. 105, 112 (1977) ("Due Process Clause applies to the deprivation of a [truck] driver's license by the State[.]"); *Banks v. Block*, 700 F.2d 292, 297 (6th Cir. 1983) (food stamp recipients have a cognizable interest in benefits during their unexpired certification period). These heightened interests are clearly distinguishable from a $10 recreational pool pass.

In this regard, the Supreme Court has recognized that, "[the] range of interests protected by procedural due process is not infinite." *Ingraham v. Wright*, 430 U.S. 651, 672 (1977) (internal quotation marks and

citation omitted). A protected property interest generally "must be more than [a] *de minimis*" interest. *Omosegbon v. Wells*, 335 F.3d 668, 674 (7th Cir. 2003). *See, e.g.*, *Laney v. Farley*, 501 F.3d 577, 584 (6th Cir. 2007) (finding "a one day in-school suspension to be a *de minimis* deprivation"); *Gillard v. Norris*, 857 F.2d 1095, 1098 (6th Cir. 1988) (finding a police officer's three-day suspension from work to be a de minimis deprivation of property not deserving of due process protection). Here, although Kennedy arguably had a property interest in his $10 pool pass of which the City deprived him, "the nature of [that] interest" is de minimis when viewed against the background of reason, Supreme Court case law, and this court's past decisions. *Roth*, 408 U.S. at 571. Accordingly, we hold that Kennedy did not have a property interest "sufficient to invoke the procedural protections of the Due Process Clause." *Meachum v. Fano*, 427 U.S. 215, 224 (1976).

IV.

Kennedy next claims his ban from CRC properties deprived him of his liberty interest to enter certain public spaces, as guaranteed by the Due Process Clause of the Fourteenth Amendment. In *City of Chicago v. Morales*, 527 U.S. 41 (1999), the United States Supreme Court addressed Chicago's "Gang Congregation Ordinance," which prohibited "criminal street gang members" from "loitering" in public places. *Id.* at 45-46 (internal quotation marks omitted). In addressing the overbreadth doctrine, Justice Stevens, writing for the plurality, stated:

> [T]he freedom to loiter for innocent purposes is part of the "liberty" protected by the Due

> Process Clause of the Fourteenth Amendment. We have expressly identified this "right to remove from one place to another according to inclination" as "an attribute of personal liberty" protected by the Constitution. *Williams v. Fears*, 179 U.S. 270, 274 (1900); *see also Papachristou v. Jacksonville*, 405 U.S. 156, 164 (1972). Indeed, it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is "a part of our heritage[,]" *Kent v. Dulles*, 357 U.S. 116, 126 (1958), or the right to move "to whatsoever place one's own inclination may direct" identified in Blackstone's Commentaries. 1 W. Blackstone, Commentaries on the Laws of England 130 (1765).

Id. at 53-54 (footnotes omitted). *See also Anthony v. Texas*, 209 S.W.3d 296, 307-08 (Tx. Ct. App. 2006) (holding plaintiff "clearly had a liberty interest [to enter a public] park.").

Assuming that Kennedy's version of the facts are true, defendants have barred Kennedy from entering any property deemed a part of the City of Cincinnati's recreational system, which presumably encompasses more than its public pools, and certainly encompasses more than Mt. Washington pool. "The City's action is reminiscent of a partial banishment, which serves to expel [Kennedy] from certain portions of City property[.]" *Doe v. City of Lafayette*, 377 F.3d 757, 780 (7th Cir. 2004) (en banc) (Williams, J., dissenting) (citing *Smith v. Doe*, 538 U.S. 84, 98 (2003)) (discussing banishment as a measure historically recognized as punishment). Thus, it is clear that

Kennedy had a liberty interest "to remain in a public place of his choice" and that defendants interfered with this interest. *Morales*, 527 U.S. at 54.

V.

At oral argument, Kennedy's counsel conceded that his client had not sufficiently alleged a procedural due process claim against Hudepohl. In light of this concession, we reverse the part of the district court's order denying Hudepohl qualified immunity on the alleged constitutional violation of Kennedy's due process rights. Kennedy's state law claim of defamation against Hudepohl was not raised in this interlocutory appeal and may proceed in the district court. Thus, below we limit our discussion to the part of the district court's order denying Zucker qualified immunity.

VI.

"We review the denial of summary judgment on grounds of qualified immunity *de novo* because application of this doctrine is a question of law." *McCloud v. Testa*, 97 F.3d 1536, 1541 (6th Cir. 1996). "The doctrine protects all but the plainly incompetent or those who knowingly violate the law." *Dorsey v. Barber*, 517 F.3d 389, 394 (6th Cir. 2008) (internal quotation marks and citations omitted). When the defendant raises a defense of qualified immunity, the plaintiff bears the burden of demonstrating that the defendant is not entitled to such immunity. *Silberstein v. City of Dayton*, 440 F.3d 306, 311 (6th Cir. 2006).

"Through the use of qualified immunity, the law shields 'government officials performing discretionary functions . . . from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.'" *Solomon v. Auburn Hills Police Dep't*, 389 F.3d 167, 172 (6th Cir. 2004) (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)). In determining whether a defendant is entitled to qualified immunity, the court makes two inquiries: (1) "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right[,]" and (2) was the right clearly established to the extent that a reasonable person in the officer's position would know that the conduct complained of was unlawful. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Although *Saucier* mandated that these questions be addressed in order, that requirement has since been relaxed. *See Pearson v. Callahan*, — U.S. — , 129 S. Ct. 808, 818 (2009) ("On reconsidering the procedure required in *Saucier*, we conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory.").

Here, after Zucker questioned Kennedy for approximately fifteen minutes, he determined that his "basis for any reasonable suspicion to stop Mr. Kennedy had ceased, because [he] had no crime that [he] could verify had been committed, nor could [he] identify one that [was] being committed or [was] going to be committed." Zucker informed Hudepohl of this fact, but Hudepohl still asked Zucker to confiscate Kennedy's pool pass and to order him off the premises. Zucker fully complied with this request, and, arguably,

ordered Kennedy to not enter *any* CRC property for an indefinite period of time.

Zucker avers that he should be immune from suit because he was following the orders of Hudepohl, an agent of the municipal pool. However, "since World War II, the 'just following orders' defense has not occupied a respected position in our jurisprudence, and officers in such cases may be held liable under § 1983 if there is a reason why any of them should question the validity of that order." *O'Rourke v. Hayes*, 378 F.3d 1201, 1210 n.5 (11th Cir. 2004) (internal quotations marks and citation omitted). Regardless of the authority Hudepohl possessed, Zucker was not "relieve[d] . . . of his responsibility to decide for himself whether to violate clearly established constitutional rights[.]" *Id.* at 1210. "[U]nder the Supremacy Clause, public officials have an obligation to follow the Constitution even in the midst of a contrary directive from a superior or in a policy." *N.N. ex rel. S.S. v. Madison Metro. Sch. Dist.*, — F. Supp. 2d —, 2009 WL 4067779, at *6 (W.D. Wis. Nov. 24, 2009). *See, e.g., Glasson v. City of Louisville*, 518 F.2d 899, 903-04 (6th Cir. 1975) (officer that was following police chief's order was not immune from suit). Thus, viewing the facts alleged in the light most favorable to Kennedy, we conclude that Zucker violated Kennedy's constitutional rights by banning him from all City recreational property without due process of law.

We must therefore determine whether Kennedy's right to lawfully remain in public spaces was clearly established. "[I]n the ordinary instance, to find a clearly established constitutional right, a district court must find binding precedent by the Supreme Court, its court of appeals or itself." *Ohio Civil Serv. Employees*

Ass'n v. Seiter, 858 F.2d 1171, 1177 (6th Cir. 1988). Yet, to be "clearly established" there need not be a prior case deciding that "the very action in question has previously been held unlawful[.]" *Anderson*, 483 U.S. at 640. In *McCloud*, we noted that if courts required prior precedent on the specific facts at issue in the pending case, "qualified immunity would be converted into a nearly absolute barrier to recovering damages against an individual government actor. . . ." *McCloud*, 97 F.3d at 1557. "[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question[.]" *United States v. Lanier*, 520 U.S. 259, 271 (1997).

It is apparent that Kennedy had a clearly established right to remain on public property based on the Supreme Court's holdings in *Fears*, 174 U.S. at 274, *Papachristou*, 405 U.S. at 164, *Kent*, 357 U.S. at 126, and *Morales*, 527 U.S. at 53-54. "[T]he preexisting law was sufficient to provide the defendant with 'fair warning' that his conduct was unlawful." *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir. 2000) (quoting *Lanier*, 520 U.S. at 270-71). Any competent government official, particularly a police officer, should have realized that he cannot deprive a person, who has not committed a crime or violated some regulation, nor was likely to do so, of access to public grounds without due process of law. Therefore, we hold that for purposes of defendants' motion for summary judgment, Kennedy possessed a constitutionally-protected liberty interest to use municipal property open to the public and that depriving him of his liberty interest, without

procedural due process, constituted a violation of a clearly established constitutional right.[7]

VII.

For these reasons, we affirm in part, and reverse in part, the judgment of the district court, and remand for further proceedings consistent with this opinion.

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[7] As the district court noted, "entry of judgment regarding qualified immunity must await the jury's resolution of the disputed facts as to the process afforded." Moreover, the scope and duration of Kennedy's ban from CRC grounds, as well as whether or not the facts support a revocation for good cause under the pool's rules, remain in dispute. Therefore, the trier of fact will need to resolve these genuine issues of material fact before a final determination regarding qualified immunity can be made.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 07-cv-512
U.S. Magistrate Judge Timothy S. Black

[Filed January 12, 2009]

ROBERT KENNEDY,	)
	)
Plaintiff,	)
	)
vs.	)
	)
CITY OF CINCINNATI, *et al.*	)
	)
Defendants.	)
	)

MEMORANDUM OPINION AND ORDER

This civil action is before the Court on the parties' cross motions for summary judgment (Docs. 38, 44) and the parties' responsive memoranda (Docs. 44, 63, 34). The parties have consented to final adjudication by a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). (*See* Doc. 5.) For the reasons that follow, the parties' cross motions for summary judgment are **DENIED**, but for defendants' motion for summary judgment in favor of defendant the City of

Cincinnati only, which is **GRANTED**, and otherwise this case shall commence to trial on February 9, 2009, as scheduled.[1]

ANALYSIS

This is a difficult case. The fundamental issue presented is whether access to public pools is a cognizable property interest such that revoking a citizen's access without appropriate procedural due process would be violative of the U.S. Constitution. A following question is, if access to public pools is a cognizable property interest, then what procedural due process would be due when revoking access? And the next sequential issue is whether the right to access to the public pools was a clearly established right in the context of what occurred here. Finally, there are questions of defamation, qualified privilege, and actual malice. Each issue is complex, highly factually driven, hotly disputed, and all are intertwined with questions of law (and not fact).

Here, "the Cincinnati Recreation Commission is dedicated to providing recreational and cultural

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[1] A motion for summary judgment should be granted if the evidence submitted to the Court demonstrates that there is no genuine issue as to any material fact, and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party has the burden of showing the absence of genuine disputes over facts which, under the substantive law governing the issue, might affect the outcome of the action. *Celotex*, 477 U.S. at 323. All facts and inferences must be construed in a light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp* , 475 U.S. 574, 587 (1986).

activities for all people in our neighborhoods and the whole community," and, accordingly, "recreation programs and facilities are open to all citizens regardless of race, gender, color, religion, nationality, sexual orientation or disability."[2] Any non-disqualified person may purchase a pool pass for $10.00 and gain access to the public pools.[3] The recipient of a pool pass covenants to be bound by the rules and regulations attendant to use of the Cincinnati Recreation Commission's pools.[4]

So, is access to the public pools a cognizable property interest? Alas, "[t]here can be no precise definition of a property interest, since it is one of the constitutional concepts purposely left to gather meaning from experience."[5] Nonetheless, the decided cases have established basic principles to identify those property interests which rise to a level warranting constitutional protection.

"To have a property interest in a benefit a person must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of

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[2] *See* Mission Statement of the Cincinnati Recreation Commission; *see also* Ex. 11 to Deposition of J. Yemaya. (2007 Booklet of CRC Rules governing the Aquatic Division) (Doc. 54).

[3] Ex. 11 to Depo. of J. Yemaya. (2007 Booklet of CRC Rules governing the Aquatic Division) (Doc. 54).

[4] *Id.*

[5] *Banks v. Black*, 700 F.2d 292, 295-96 (6th Cir.), *cert denied*, 464 U.S. 934 (1983) (quoting *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., Inc.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting).

entitlement to it."[6] Here, the City pools being open to all persons who do not possess a disqualifying condition, and plaintiff having been an approved purchaser of a pool pass, plaintiff had a legitimate claim of entitlement to access to the pools and not merely a unilateral desire for access.

Accordingly, the Court finds that access to the public pools constitutes a cognizable property interest.[7]

However, the cognizable property interest plaintiff possessed was merely in a revokable license. And the license could be revoked for good cause under the rules and regulations attending the license.

Here, whether or not the facts evidence a revocation for good cause under the inherent rules remains in dispute. The jury will need to determine the facts as to the unfolding of the revocation.

What process would be due appears to be a question of law. However, what process was afforded and what appeal process existed, if any, remain disputed questions of fact. The jury will need to determine the facts as to what procedural process was

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[6] *Id.* at 296.

[7] *See, e.g., Barry v. Barachi*, 443 U.S. 55, 64 (1978) (a horse trainer has a cognizable property interest in a horse race trainer's licence sufficient to invoke the protection of the due process clause); *Dixon v. Love*, 43 1 U.S. 105, 112-16 (1977) (due process clause applies to deprivation of a driver's licence by the state); *Banks v. Black*, 700 F.2d 292, 295-98 (6th Cir.), *cert denied*, 464 U.S. 934 (1983) (food stamp recipients have a cognizable interest in benefits during their unexpired certification period).

afforded or available - pre-revocation and post-revocation. It would appear that minimal pre-revocation procedural due process would be required, if any, and the jury must sort through the facts as to whether or not, pre-revocation, plaintiff was afforded notice and a fair opportunity to confront the evidence against him and tell his side of the story. Moreover, the jury will need to determine further if plaintiff had any post-revocation avenue of appeal.

The jury's intervention is required to resolve the disputed facts before the Court can resolve the questions of law. It would appear that all that procedural due process would require in the context of revocation of a pool pass would be notice of a hearing, a fair hearing, and an opportunity to confront the evidence.[8]

As to the defense of qualified immunity, plaintiff must show: (1) that defendants Hudepohl and Officer Zucker violated his rights; and (2) that the rights were clearly established.[9] Here, although the law appears clearly established that a cognizable property interest in access to the public pools cannot be revoked on a

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[8] *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542-46 (1971) ("the formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of subsequent proceedings" . . . and a tenured public employee to whom a post-termination hearing is available is entitled merely to "oral or written notice of the charges against him, an explanation of the employer's evidence, and the opportunity to present his side of the story.")

[9] *Thacker v. Lawrence County*, 182 Fed. Appx. 464, 468-69 (6th Cir. 2006) (citing *Estate of Carter v. City of Detroit*, 408 F.3d 305, 310-11 (6th Cir. 2005)).

whim without a modicum of procedural due process, entry of judgment regarding qualified immunity must await the jury's resolution of the disputed facts as to the process afforded. The pretrial record sets forth genuine issues of material facts for trial as to qualified immunity.[10]

As to the defamation claim, plaintiff presents a *prima facie* case. In response, defendant Hudepohl proffers evidence of a qualified privilege. Thus, if the jury concludes on the facts that the defendant acted in good faith, in seeking to uphold a legitimate interest, and that his statement was limited to upholding that interest, and that the occasion of the statement was proper, and that the publication of the statement was made in the proper manner to the proper parties, then defendant will have established his qualified privilege.[11] In the face of that, plaintiff must present clear and convincing evidence that defendant acted with actual malice.[12] The jury's intervention is required to determine the facts as to the elements of the qualified privilege. And whether defendant Hudepohl acted with actual malice also awaits resolution of the disputed facts.

Notwithstanding the foregoing, one issue which can be resolved as a matter of law upon the pre-trial record is that the defendants' motion for summary judgment

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[10] *See McKenna v. City of Royal Oak*, 2006 WL 3408190, at *2 (6th Cir. Nov. 28, 2006)

[11] *Jackson v. City of Columbus*, 117 Ohio St.3d 328, 331 (2008) (quoting *Hahn v. Kotten*, 43 Ohio St.2d 237, 246 (1975)).

[12] *Id.* at 331

is well-taken as to the claims alleged against the City of Cincinnati. Plaintiff's claims against the City of Cincinnati are based solely upon actions taken by city employees, but as there is no liability pursuant to *respondeat superior* for claims brought under 42 U.S.C. § 1983,[13] plaintiff's claims against the City fail as a matter of law. Accordingly, the Court hereby **GRANTS** summary judgment for the City of Cincinnati against the Plaintiff and dismisses the City as a defendant.

Otherwise, the parties' cross motions for summary judgment are **DENIED**, and the case shall commence to trial on February 9, 2009, as scheduled.

IT IS SO ORDERED.

Date: 1/12/09 /s/Timothy S. Black
Timothy S. Black
United States Magistrate Judge

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[13] *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 691 (1978).

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 07-cv-512
Magistrate Judge Timothy S. Black

[Filed July 22, 2008]

ROBERT KENNEDY,	)
	)
Plaintiff,	)
	)
vs.	)
	)
CITY OF CINCINNATI, *et al.*	)
	)
Defendants.	)
	)

MEMORANDUM OPINION AND ORDER

This civil action is before the Court on Defendants' motion to dismiss Plaintiff's amended complaint (Doc. 14) pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and Plaintiff's responsive memoranda (Doc. 18). The parties have consented to final adjudication by a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). (*See* Doc. 5). For the reasons that follow, the Court **DENIES** Defendants' motion to dismiss (Doc. 14).

I. BACKGROUND

Plaintiff filed this lawsuit alleging that Defendants violated Plaintiff's constitutional rights by confiscating his property, and by restricting his liberty, without due process of law. Defendants are the City of Cincinnati, Cincinnati Police Officer Zucker, and David Hudepohl, a Cincinnati Recreation Commission ("CRC") swimming pool manager. Additionally, Plaintiff alleges that Defendant Hudepohl defamed Plaintiff by falsely imputing that he had engaged in serious sexual misconduct. (Doc. 12).

The allegations of the Plaintiff in the amended complaint reflect the following: Plaintiff alleges that in June 2007 he owned a pool pass which he purchased from the CRC. (Doc. 12, ¶ 6). On the afternoon of June 21, 2007, Defendant Hudepohl observed Plaintiff at the swimming pool where Plaintiff was reading a newspaper and minding his business. (*Id.* ¶ 7). Defendant Hudepohl called the police and reported that Plaintiff had been following kids from the pool area "into the woods, daily," for a week, and that he had been "kicked out [several] times, [for] lurking." (*Id.* ¶ 9). Defendant Hudepohl reported that Plaintiff was at the pool and requested that Defendant Zucker confront him. (*Id.*) Plaintiff claims that he never followed any children nor was he ever kicked out of the facility for "lurking." (*Id.* ¶ 10).

Defendant Zucker and a second officer approached Plaintiff in the pool area accompanied by Defendant Hudepohl. (Doc. 12, ¶ 13). Defendant Zucker questioned Plaintiff for approximately 15 minutes, during which time Defendant Zucker informed Plaintiff that he was "accused" of "staring" at children.

(*Id.* ¶ 14). This detention occurred in plain sight of and within earshot of Plaintiff's neighbors. (*Id.* ¶ 15). Plaintiff was not charged with any crime or arrested. (*Id.* ¶ 17). Moreover, Defendant Zucker had no reasonable suspicion that a crime had been or would be committed. (Doc. 18, Ex. 1). Still, Defendant Zucker confiscated Plaintiff's swimming pool pass and ordered him to stay off all municipal land and facilities operated by the CRC. (Doc. 12, ¶ 17).

II. PROCEDURAL HISTORY

Plaintiff filed his complaint (Doc. 1) on July 2, 2007, asserting a claim for deprivation of civil rights pursuant to 42 U.S.C. § 1983. On February 14, 2008, Plaintiff filed an amended complaint (Doc. 12), adding a claim for defamation and naming David Hudepohl as a Defendant.

On March 3, 2008, Defendants filed a motion to dismiss Plaintiff's amended complaint (Doc. 14), seeking dismissal of Plaintiff's claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief could be granted. Plaintiff responded to the motion to dismiss on March 27, 2008. (Doc. 18).

III. STANDARD OF REVIEW

The purpose of Rule 12(b)(6) is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief if all the facts and allegations in the complaint are taken as true. *See Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993). To that end, for purposes of a motion to dismiss under Rule 12(b)(6), the complaint must be construed in the light most

favorable to the nonmoving party and its allegations taken as true. *Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995).

Nevertheless, "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007) (internal citations omitted).

Thus, the test for dismissal under Rule 12(b)(6) is a stringent one, and "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 811 (1993) (*quoting Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)); *see also Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1189 (6th Cir. 1996).

IV. ANALYSIS

A. Deprivation of Civil Rights in Violation of 42 U.S.C. § 1983

Defendants challenge the legal sufficiency of the amended complaint, which is premised upon 42 U.S.C. § 1983, arguing that the allegations fail to state a claim upon which relief may be granted and that

Defendants are immune from suit by reason of the defense of qualified immunity.

1. Section 1983 Claim

To state a cause of action under Section 1983 for violation of the Due Process Clause, a plaintiff must show that he has asserted a recognized liberty or property interest within the purview of the Fourteenth Amendment, that he was intentionally or recklessly deprived of that interest, even temporarily, under color of state law, and that the conduct of the defendant as alleged by the plaintiff was clearly unconstitutional. *Ingraham v. Wright*, 430 U.S. 651, 672 (1977).

In support of dismissal, Defendants argue that Plaintiff's swimming pool pass was a license, not a property interest, and therefore could be revoked at any time. (Doc. 14). Accordingly, under Defendants' theory, the revocation of Plaintiff's pool pass license did not deprive Plaintiff of any protectable property interest or due process rights.

However, Defendants' factual contention is not based on the "four corners" of Plaintiff's amended complaint, but rather assumes facts not in evidence. Pursuant to Fed. R. Civ. P. 12(b)(6), courts are not permitted to look beyond the four corners of the pleadings when resolving a motion to dismiss. *Kostrzewa v. City of Troy*, 247 F.3d 633, 643 (6th Cir. 2001). The Court's duty is to determine whether the defendant is entitled to prevail on a motion to dismiss based solely upon the factual allegations contained in the complaint. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519,

526 (1983); *Lee v. W. Reserve Psychiatric Habilitation Ctr.*, 747 F.2d 1062, 1065 (6th Cir. 1984).

The pleadings in this matter do not address the circumstances under which the City can revoke a pool pass unilaterally; therefore, Defendants' argument is beyond the four corners of the pleadings and it is not well taken in the context of a motion to dismiss. Plaintiff has alleged sufficient facts to state a cause of action under 42 U.S.C. § 1983.

2. *Qualified Immunity*

Defendants further argue that even if Plaintiff does state a cause of action, Defendants are shielded from liability under the doctrine of qualified immunity. The burden is on the plaintiff to show that the defendant is not entitled to qualified immunity. *Smoak v. Hall*, 460 F.3d 768, 778 (6th Cir. 2006). The Supreme Court has developed a two-part test to determine whether a defendant is entitled to qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *see also*, *Poe v. Haydon*, 853 F.2d 418, 423 (6th Cir. 1988). First, a court must determine if the facts taken in the light most favorable to the injured party show that the defendants conduct violated a constitutional right. *Id.* Second, if the court finds that such a violation has occurred, the court must determine if the right was "clearly established." *Id.*; *see also, Dominque v. Telb*, 831 F.2d 673, 676 (6th Cir. 1987). Where the right involved is clearly established, it can be inferred that the conduct is objectively unreasonable. *Caudill v. Hollan*, 431 F.3d 900, 911 n. 10 (6th Cir. 2005).

The Court finds that Plaintiff has plead sufficient facts to overcome the qualified immunity defense at

this stage. Accepting the facts as true as alleged gives rise to findings that: (1) Plaintiff had a cognizable property interest in his pool pass, if it was not a revokable license, which was confiscated without due process of law in violation of his constitutional rights; (2) these rights were clearly established; and (3) by inference, Defendants' conduct was objectively unreasonable.

B. Defamation *Per Se*

Defendants further allege that Plaintiff fails to state a claim for defamation *per se*, because Defendant David Hudepohl did not "import an indictable offense" as to Plaintiff. Defamation *per se* occurs when material is defamatory on its face. *Gosden v. Louis*, 116 Ohio App. 3d 195, 206, 687 N.E.2d 481 (Summit Cty. 1996). The following categories of statements fall within the ambit of defamation *per se*: (1) words which *import an indictable criminal offense involving moral turpitude* or infamous punishment; (2) words that impute some loathsome or contagious disease which excludes one from society; and (3) words that tend to injure one in his trade or occupation. *Kanjuka v. Metrohealth Med. Ctr.*, 151 Ohio App.3d 183, 191-92, 783 N.E.2d 920 (Cuyahoga Cty. 2002).

Here, it appears that Plaintiff's allegations as to Defendant Hudepohl suggest that Plaintiff was someone who was engaging in the sexual molestation of minor boys, and, therefore, sufficiently state a cause of action for slander *per se*, given Plaintiff's assertion that such statements are untrue. Accepting the alleged facts as true, Plaintiff's claims are sufficient to state a claim for defamation *per se*.

V. CONCLUSION

For the reasons stated above, the Court **DENIES** Defendants' motion to dismiss (Doc. 14).

IT IS SO ORDERED.

Date: July 22, 2008

s/Timothy S. Black
Timothy S. Black
United States Magistrate Judge